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No. 81-64

IN THE

Supreme Court of the United States

October Term, 1981

LEONARD H. TOSE, TOSE INC.,
and
THE PHILADELPHIA EAGLES FOOTBALL CLUB,
Petitioners,

v.

FIRST PENNSYLVANIA BANK, N.A., JOHN R. BUNTING, JOHN C. PEMBERTON, HERBERT BARNESS, SIDNEY FORSTATER, PROVIDENT NATIONAL BANK, THE CHASE MANHATTAN BANK, N.A., GIRARD BANK, PHILADELPHIA NATIONAL BANK, AND JOHN D. FIRESTONE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENT THE CHASE MANHATTAN BANK, N.A. IN OPPOSITION

PATRICK T. RYAN
KATHLEEN M. LYNCH
DRINKER BIDDLE & REATH
1100 Philadelphia National Bank Building
Philadelphia, Pennsylvania 19107
(215) 988-2700
Attorneys for Respondent The Chase Manhattan Bank, N.A.

Of Counsel:

MILBANK, TWEED, HADLEY & MCCLOY
One Chase Manhattan Plaza
New York, New York 10005

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-5711

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court of Appeals properly affirmed the District Court's grant of summary judgment in favor of The Chase Manhattan Bank, N.A. ("Chase") on petitioners' alleged "banking boycott" claim where petitioners, in the face of substantial unimpeached and uncontroverted evidence to the contrary, failed to produce any evidence that Chase conspired with the other respondents, or that Chase acted in contradiction of its own economic interests, or that Chase had motivation to join any such "banking boycott."

2. Whether the Court of Appeals properly affirmed the District Court's grant of summary judgment in favor of Chase on petitioners' alleged "prime rate conspiracy" claim where petitioners failed to produce any evidence that Chase participated in the alleged conspiracy or that lock-step pricing of shared credits had any effect on the rate charged on petitioners' loans.

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Respondent The Chase Manhattan Bank, N.A., respectfully requests that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals, which unanimously affirmed the judgment of the District Court, is reported at 648 F. 2d 879.

The opinion of the District Court, which granted summary judgment dismissing petitioners' claims against Chase, is reported at 492 F. Supp. 246.

Both opinions are reproduced in the appendix to the petition for writ of certiorari ("P-App.").

COUNTER-STATEMENT OF THE CASE

In November 1977, Lincoln Bank of Bala Cynwyd, Pennsylvania asked Chase to consider participating in loans to Leonard Tose ("Tose") and the Philadelphia Eagles Football Club ("Eagles"). P-App. at 19, 52. On November 22 and 28, 1977, Thomas Reifenheiser of Chase and other Chase representatives met with Tose and others to discuss the proposed loans.

On December 8, Reifenheiser again met with Tose, Tose's attorney Edwin P. Rome, and others to discuss the terms of two proposed loans, one in the amount of $1,750,000 to Tose personally and a second in the amount of $7,000,000 to the Eagles. P-App. at 53. On the same day, Chase requested its New York lawyers, the firm of Milbank, Tweed, Hadley & McCloy, to review the legal aspects of the proposed Tose/Eagles loans. P-App. at 20, 53. On December 9, Chase directed routine credit inquiries to, among other sources, First Pennsylvania Bank. A representative of First Pennsylvania Bank responded: "Our bank no longer deals with Mr. Tose. Published information will offer the reasons for our discontinuing our relationship. I can offer no details regarding his affairs." P-App. at 20, 53-54.

Upon reviewing the documentation for the proposed loans, Milbank attorneys identified a number of legal problems. Because Tose had insisted on a December 21 closing, a meeting was scheduled on December 20 to discuss Chase's legal concerns with Tose's attorney, Rome. While Rome was enroute to New York, Tose called Rome's office and advised one of Rome's partners that he did "not wish to continue with the Lincoln-Chase loan" because of conditions imposed by the banks. P-App. at 20. Presumably, had Rome been aware of Tose's call, Rome would not have attended the meeting in New York, Chase would

not have declined to make the loans (because Tose wanted to terminate the negotiations), and Chase would never have been dragged into Tose's acrimonious dispute with First Pennsylvania Bank and the other respondents. P-App. 20.

At the meeting in New York, Chase's attorneys advised Rome that the documentation for the security for the proposed loans was inadequate and that, based on the information then in their possession, they would be unable to give Chase a satisfactory legal opinion concerning the security. P-App. at 20, 53. The legal difficulties raised by Chase, which were memorialized in a Milbank memorandum dated December 29, 1977, related to Barness' right of first refusal to acquire Tose's interest in the Eagles, ambiguities in the partnership agreement regarding transfer of the general partnership interest and appointment of a successor general partner, pending lawsuits filed against Tose by Barness and Firestone, the necessity for Interstate Commerce Commission approval of a promissory note to be given by Tose, Inc., the requirement that the City of Philadelphia consent to assignment of the Eagles' stadium lease as security, the fact that NFL television contracts which were to be security for the proposed loans were not in existence, and Tose's wife's dower interest in real property which was to be mortgaged as part of the transaction. P-App. at 20 n. 10. Prior to the conclusion of the December 20 meeting, Chase informed Rome that due to these unresolved legal matters, Chase would decline to make the loan. On December 27, 1977, Reifenheiser confirmed to Tose in writing that Chase had decided not to make the proposed loans because of "unresolved legal matters and the expectation that a significant additional commitment of our time will be required with no assurance of a favorable outcome." P-App. at 21, 53.

On January 12, 1978, approximately three weeks after Chase's decision was communicated to Tose, Barness

sent a letter to Peter Lengyel, a Chase officer, indicating that he had learned that Chase was considering making a loan to Tose and the Eagles and that he wanted to inform Chase that he was a limited partner in the Eagles and had a right of first refusal to acquire Tose's interest in the partnership. P-App. at 54. After contacting Reifenheiser to determine the status of the proposed loans, Lengyel informed Barness that Chase had already declined to extend credit to Tose and the Eagles.

Chase had no other contacts with any respondent concerning loans to Tose or the Eagles.

Petitioners commenced this action on May 5, 1978. Two years later, after what the District Court termed "practically unlimited discovery" P-App. at 52, Chase moved for summary judgment. The District Court granted Chase's motion by memorandum and order entered May 28, 1980. *Tose v. First Pennsylvania Bank, N.A.*, 492 F. Supp. 246 (E. D. Pa. 1980). The District Court found that petitioners' evidence linking Chase to the alleged "banking boycott," consisting only of Chase's routine credit inquiry to First Pennsylvania Bank and Barness' contact with Chase after Chase had turned down the proposed loans, was "insufficient to support an inference that Chase joined the alleged conspiracy." P-App. at 54. The District Court also found no evidence that Chase had acted other than in its own economic interest or that Chase had any motive to join the alleged "banking boycott." P-App. at 56.

Although petitioners moved for summary judgment on their alleged "prime rate conspiracy" claim, they failed to introduce any evidence concerning the history of Chase's prime interest rate changes, or any meetings with other respondents involving Chase, or any loans in which Chase participated which were based on the prime interest rate of any other respondent bank. The

District Court dismissed petitioners' alleged "prime rate conspiracy" claim, declining to hold that the universal banking practice of participating in shared credits, priced with reference to a single bank's prime interest rate, is a *per se* violation of the Sherman Act. P-App. at 65-68.

The Court of Appeals unanimously affirmed the District Court's judgment. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879 (3d Cir. 1981). On petitioners' alleged "banking boycott" claim, the Court of Appeals found that petitioners had offered no direct evidence of conspiracy and that petitioners' meager circumstantial evidence of conspiracy was inadequate in view of respondents' "substantial unrebutted and unimpeached evidence" that they acted only in furtherance of their economic self-interests. P-App. at 33. The Court of Appeals also found "clearly insufficient" petitioners' proffer of evidence on respondents' motivation to enter into a conspiracy. *Id.* The Court of Appeals further held that petitioners lacked standing to assert their alleged "prime rate conspiracy" claim because petitioners produced "no evidence that lock-step pricing of joint loans had any effect on the rate charged on their own loans . . . ." P-App. at 37. The Court of Appeals did not consider the merits of petitioners' "prime rate conspiracy" claim, but accurately termed it "doubtful." P-App. at 35.

REASONS FOR DENYING THE WRIT

The petition for a writ of certiorari should be denied because both courts below fully considered the complete record before them and correctly decided that petitioners' proffer of evidence against the respondent banks—and especially against Chase—was insufficient to permit an inference of a "banking boycott" or a "prime rate conspiracy." "Summary judgment is appropriate in those antitrust cases where plaintiffs, after having engaged in significant discovery, fail to produce 'significant probative evidence' in support of the allegations in their complaint. *First National Bank of Arizona v. Cities Service Co.*, 391 U. S. 253, 289-90 (1968). *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F. 2d 573, 579 (3d Cir. 1979)." *Tose v. First Pennsylvania Bank, N.A.*, 492 F. Supp. 246, 251 (E. D. Pa. 1980).

Petitioners had full opportunity in the courts below to present their case, yet petitioners offered *no evidence* that Chase had conspired with the other respondents to effect a "banking boycott," *no evidence* that Chase acted in the matter other than in its economic self-interest, *no evidence* that Chase had a motive to join the alleged "banking boycott," and *no evidence* that Chase participated in a "prime rate conspiracy" or, even if it had, that petitioners were affected by it. Furthermore, petitioners offered *no evidence* to rebut or to impeach Chase's substantial evidence refuting petitioners' allegations.

This case has been decided adversely to petitioners on its facts. Further review by this Court is inappropriate because it would not involve important questions of law but rather would entail only needless reconsideration of petitioners' inadequate proof. *Cf. Graver Manufacturing Co. v. Linde Co.*, 336 U. S. 271, 275 (1949). Thus, review by this Court would be of interest only to the immediate parties to this litigation.

Moreover, the reasons set forth in the petition for granting a writ of certiorari are hardly persuasive, and none of the enumerated reasons is supported by the record or by the petition. The gist of petitioners' seven reasons for granting a writ is that the Sherman Act and the Bank Holding Company Act are being misapplied by the lower courts and are in urgent need of clarification by this Court. In view of the failure of petitioners' case on the facts, however, this Court's attention to the alleged conflict and confusion in the lower courts is hardly warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICK T. RYAN
KATHLEEN M. LYNCH
DRINKER BIDDLE & REATH
1100 Philadelphia National
Bank Building
Philadelphia, Pennsylvania 19107
(215) 988-2700
Attorneys for Respondent
The Chase Manhattan Bank, N.A.

Of Counsel:
Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, New York 10005

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